SUPREME COURT, U.S.
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No. 01-549

IN THE

Supreme Court of the United States

KEVIN J. RICHTER,

Petitioner,

v.

BARBARA A. RICHTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is marriage a "contract" protected by the Contract Clause of the United States Constitution?

2. If so, must statutes permitting divorce be construed to require proof of a traditional contract defense before a Court can dissolve a marriage?

3. Was Kevin Richter deprived his right to a hearing with the assistance of counsel?

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STATEMENT OF THE CASE

This matter was first scheduled for trial on March 24, 2000 before a Minnesota District Court. Upon the parties' agreement, and with the Court's consent, the parties instead used that date for an informal pretrial conference, devoted to settlement negotiations. Until such date, both Barbara Richter ("Barbara") and Kevin Richter ("Kevin") were represented by counsel.

On March 24, 2000, Kevin became dissatisfied with the efforts of his attorney. He, thus, requested his attorney's discharge. During a brief hearing, Kevin consented to the discharge and advised that "I'm willing to represent myself in this matter . . .".

And so, the first trial date passed.

By Order of April 5, 2000, the District Court gave notice the matter would be tried on May 8, 2000. Kevin made no effort to request a continuance of such final hearing until providing the Court a letter request on May 5, 2000. He made no showing that, until the absolute last moment, he'd used the intervening period to obtain new counsel.

Earlier, on or about April 26, 2000, Kevin filed an untimely "Motion to Dismiss" claiming, among other things, that Minnesota's dissolution statutes ran afoul of the Contract Clause of the United States Constitution. He purported to schedule a hearing on his motion to take place at the time and date of trial. The same day Kevin filed his motion, the District Court dismissed it, sua sponte, as "without merit".

On the morning of trial, Kevin appeared, pro se, again requesting a continuance. His request was denied. The Court noted: (1) Kevin consented to the withdrawal of his attorney; (2) Kevin's request for continuance was not timely made; and (3) Kevin's request was made, not in good faith, but for purpose of delay. Whereupon, Kevin chose to participate no further and left the Courthouse. The trial took place without him.

During the trial, Barbara testified that her marriage was irretrievably broken, beyond repair or salvation. To explain, she testified that her marriage was loveless and without intimacy. She and Kevin had longstanding disagreements on morals and values. They had been physically separated for over six months. Kevin was controlling and she was unhappy. Having been re-exposed to the outside world by taking employment, Barbara decided "this isn't the way life is suppose to be". Her life with Kevin had been one of slights, subjugation, and submission. During the marriage, Kevin had been physically abusive to her on two occasions and, on other occasions, would "tense up and turn red". Barbara suggested marital counseling to Kevin, "but he said he was happy the way things were, that he would not change, that everything was my problem." Individual counseling motivated Barbara to ask Kevin whether he loved her. He declined to answer.

Most poignantly, Barbara added that her desire to dissolve the marriage was also motivated by a desire to spare her children, as much as possible, the same control and negativism she had long experienced at Kevin's hands. Kevin never recognized an opportunity to praise and encourage the children, or missed a chance to criticize and second guess them. Tragically, tellingly, the children, too, distanced themselves from Kevin.

Lastly, Barbara explained that she and Kevin experienced differences in their faith lives. She is Lutheran. Kevin was a work in progress, evolving from Catholic to Lutheran, from Lutheran to amorphous fundamentalism. Barbara cast no aspersion on Kevin's belief system, but merely described it as different from her own.

The Court issued its Findings of Fact, Conclusions of Law and Judgment on May 22, 2000. On May 26, 2000, it entered Amended Findings of Fact, Conclusions of Law and Judgment, to correct a clerical mistake. Kevin timely appealed to the Minnesota Court of Appeals, asserting his "Contract Clause" argument. His argument was rejected and the judgment affirmed. Kevin then unsuccessfully petitioned for discretionary review by the Minnesota Supreme Court.

REASONS FOR DENYING THE WRIT

I.

MARRIAGE IS NOT A CONTRACT PROTECTED BY THE CONTRACT CLAUSE

Kevin's argument is premised upon his assertion that marriage is a contract *for all purposes*. Kevin's assertion has never been adopted by any Court in this land. To the contrary, it has been rejected time and again, once by the United States Supreme Court.

It is a longstanding legal bromide that "marriage is a contract". However, case upon case makes clear that it is a contract only *in the formation*. In Minnesota, this principal is codified:

> Marriage, *so far as its validity is concerned*, is a civil contract between a man and a woman, to

> which the consent of the parties, capable of contracting, is essential.

M.S., § 517.01 (emphasis supplied).

Down the corridors of time, whenever a litigant has claimed marriage to be a contract for all purposes, the involved Court has disagreed, explaining that the only real similarity between the two is that some minimum capacity is required to enter each relationship.

For example, in 1846, by an Act of the Maine Legislature, Franklin Adams, was divorced from his wife, Mary, and later took a new wife. Mary contested the validity of Franklin's second marriage and, by extension, the validity of the legislative divorce. Mary argued that "marriage is a contract like other contracts, that its obligations cannot be impaired without violating the clause in the constitution of the United States prohibiting the passage of any law impairing the obligation of contracts." *Adams v. Palmer, et al.*, 51 Me. 480 (Maine 1863). The Supreme Court of Maine roundly, and at length, rejected Mary's position:

> . . . it will be found that there are grave and important differences between marriage and other contracts.
>
> The contract **to marry** is like other contracts and subject to the same law. It is a contract to enter into a given relation — a peculiar **status**. But, when once the contract **to marry** has been performed, the original contract, antecedent to such marriage, is at an end. The parties, having complied with its terms, they cease to have rights

> under or by virtue of it. A new relation has been entered into, and the mere assent of the parties to enter into such relation does not thereby make such relation a contract.
>
> When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties and obligations of which rest, not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law, not contract. It was of contract that the relation should be established, but, being established, the power of the parties, as to their extent or duration, is at an end. Their rights under it are determined by the will of the sovereign as evidenced by law. They can neither be modified nor changed by any agreement of the parties. It is a relation for life; and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, as long as it continues, are such as the law determines from time to time, and none other.

Adams, *id.*, at 482-483.

The *Adams* Court, thus, concluded that divorces were not invalid as impairing the obligation of contracts. *Adams*, *id.*, at 486.

In *Wade v. Kalbfleisch*, 58 N.Y. 282 (New York 1874), the question at hand was whether the breach of a promise to marry could be asserted against the executor of one of the parties. The New York Code then maintained that "all other actions upon

contract" could be maintained against executors. The question thus framed — is marriage a contract? — was resolved decisively, in the negative, by the New York Court of Appeals:

> The general statute, "that marriage, so far as its validity in law is concerned, shall continue in this State a civil contract, to which the consent of the parties, capable in law of contracting, shall be essential", is not decisive of the question. (citation omitted). This statute declares it a civil contract, as distinguished from a religious sacrament, and makes the element of consent necessary to its legal validity, but its nature, attributes and distinguishing features it does not interfere with, or attempt to define . . . The relation is always regulated by government. It is more than a contract . . . It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy . . . It has been held not to be a contract within the provision of the United States Constitution, prohibiting States from passing laws impairing the obligations of contract. (5 Barb., 480; 6 Conn., 540; 7 Dana, 181; 4 R.I. 87.) . . . The marriage relation is essentially personal. Neither the rights, duties or obligations flowing from it can be transferred, and the action scarcely resembles in its main features, an action upon contract. In short, **no court would be justified in holding that it is an action upon contract**, within the meaning of the statute referred to.

Wade, *id.*, at 284-285 (emphasis supplied).

Kevin, in this case, makes much of the United States Supreme Court case of *Dartmouth College v. Woodward*, 4 Wheaton 518 (U.S. 1819). That case directly provides that the Contract Clause of the United States Constitution "has never been understood to restrict the general right of the legislature to legislate on the subject of divorces". Nevertheless, Kevin asserts that, by implication or suggestion, the true holding of *Dartmouth College* is directly contrary to its express language. As the Minnesota Court of Appeals noted, Kevin's position is founded upon his errant interpretation of the following sentence:

> When a state legislature shall pass an act annulling all marriages, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

Dartmouth College v. Woodward, 4 Wheaton at 629.

Kevin evidences his continued misconception by claiming here that, by the foregoing words, "Chief Justice Marshall did not deny, but affirmed that marriage is after all a contract entitled to constitutional protection". In this respect, as the Minnesota Court of Appeals correctly noted, Kevin "misreads the Supreme Court's statements on the subject of whether marriage is a contract."

To the extent there is any confusion regarding the opinion of the United States Supreme Court on the question at hand, such confusion was resolved in *Maynard v. Hill*, 125 U.S. 190 (1888). David and Lydia Maynard were married in 1828. In 1850, David left for the riches of California, leaving Lydia behind. He eventually landed in Oregon Territory, later

reconstituted as Washington Territory. In 1852, without notice of any kind to Lydia, David obtained a divorce from her by act of the Territorial legislature. Years later, the validity of that divorce was central to a property dispute.

Justice Field began the Court's opinion in *Maynard* by affirming, conclusively, that legislatures are empowered to act upon matters of divorce, except to the extent their powers are constitutionally limited:

> When this country was settled, the power to grant a divorce from the bonds of matrimony was exercised by the parliament of England. The ecclesiastical courts of that country were limited to granting of divorces from bed and board. Naturally, the legislative assemblies of the colonies followed the example of parliament and treated the subject as one within their province. And, until a recent period, legislative divorces have been granted, with few exceptions, in all the states. Says Bishop, in his Treatise on Marriage and Divorce: "The fact that at the time of the settlement of this country legislative divorces were common, competent, and valid in England, whence our jurisprudence was derived, makes them conclusively so here, **except where an invalidity is directly or indirectly created by a written constitution binding the legislative power**.

Maynard, *id.*, at 206 (emphasis supplied).

And, thus, the question became this: Was the Washington Territorial legislature's authority to grant Maynard's divorce

limited by any applicable constitutional provision? Justice Field then framed the issue which makes *Maynard* germane to this case. He said the legislature's authority was "undoubted, unless the marriage was a contract within the prohibitions of the federal constitution against its impairment by legislature" . . . and that "[t]he only inconsistency suggested is that it [the Maynard divorce] impairs the obligation of the contract of marriage." *Maynard*, *id.*, at 210.

With the question so framed, Justice Field stood firmly upon Chief Justice Marshall's conclusion in *Dartmouth College* that the Contract Clause "has never been understood to restrict the general right of the legislature to legislate on the subject of divorces". He then stated, "we are clear that marriage is not a contract within the meaning of the prohibition". *Maynard*, *id.*, at 210. By way of further explanation, Justice Field larded the Court's decision with lengthy quotations, approvingly including those set forth above from the *Adams* and *Wade* cases.

And so, the United States Supreme Court made itself quite clear: Marriage is not a contract like any other. Nor is a legislature's power to regulate it restricted in any respect by the Contract Clause of the United States Constitution.

In more recent times, one Maurice Franks — an attorney — also [unsuccessfully] argued that Colorado's no-fault divorce scheme constituted an impairment of the obligation of all marriage contracts. *In re Marriage of Franks*, 542 P.2d 845.[1] In response, the *Franks* Court held:

1. Perhaps detracting from his credibility, Mr. Franks also argued that by requiring him to work to pay his wife's attorney's fees, the trial court had acted contrary to constitutional prohibitions against slavery.

> It has been stated on numerous occasions that a marriage is a contract between the parties. While this may be so, it is undeniably distinguishable from the ordinary civil contract. The institution of marriage has always been peculiarly a creature of the state, and subject to regulation by its legislature. In this aspect, marriage is the subject of a more immediate interest to the state than is the ordinary contract. These differences have resulted in the determination that marriage is not a "contract" within the meaning of the contract clause of the constitution. *Goldberg v. Musim*, 162 Colo. 461, 427 P.2d. 698; *Maynard v. Hill*, 125 U.S. 190, 8 S. Ct. 723, 31 L. Ed. 651; *Ryan v. Ryan*, 277 So. 2d 266 (Fla. 1973); *In re marriage of Walton*, 28 Cal. App. 3d 108, 104 Cal. Rptr. 472; *Adams v. Palmer*, 51 Me. 480.

Franks, *id.*, at 850.[2]

In short, decade after decade, century after century, Court after Court has roundly rejected the argument Kevin puts forth here. The law is clear. Marriage is **not** a contract like any other. Legislatures are empowered to regulate the institution and are not constrained by state or federal constitutional Contract Clause. A litigant who factually meets a statutory standard to obtain a divorce is entitled to it.

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2. A string of similar cases holds that "equitable distribution" divorce statutes do not offend constitutional Contract Clauses. *McCree v. McCree*, 464 A.2d 922 (D.C. App. 1983); *Valladres v. Valladres*, 80 A.D.2d 244 (N.Y. 1981); *Rothman v. Rothman*, 65 N.J. 219, 320 A.2d 496 (N.J. 1974).

II.

"IRRETRIEVABLE BREAKDOWN" DOES NOT REQUIRE PROOF OF A CONTRACT DEFENSE

Kevin conditionally argues that if, and only if, marriage is a contract protected by the Contract Clause, to maintain its constitutionality the Minnesota's statutory standard for granting dissolutions — i.e., there has been an "irretrievable breakdown" of the marital relation — requires proof of a traditional contract defense. He variously asserts that "irretrievable breakdown" must be interpreted to require proof of "material breach" of the marital contract, "actual impossibility" of performance, or facts justifying "avoidance or rescission of a contract".

The Minnesota Court of Appeals nicely provided three reasons why Kevin's argument fails. First and foremost, of course, it agreed with the foregoing sentiments: Marriage is not a contract protected by the Contract Clause of United States Constitution.

Second, it explained that, even if marriage is a contract, Kevin "failed to introduce any evidence of the terms of his contract." In his Petition here, however, Kevin explains that "the marriage contract has always assumed customary obligations and mutual expectations of fidelity, protection, succor, sexual union, and care of children." By extended reasoning then, he can only be proposing that, before granting divorces, courts devote themselves to a detailed examination of questions such as these: Has party A provided party B contractually sufficient succor? Has each party fulfilled the other's sexual expectations? What evidence is there of unfaithfulness? In other words, Kevin largely urges a return

to the old fault days. For the following reasons, however, those days have been left behind:

1. No-fault grounds, it was hoped, would reduce parties' hostility for one another. The old fault grounds, with their antiquated defenses, were thought to breed costly, bitter, litigation, which impeded the likelihood of reconciliation and wrought destruction extending beyond the parties themselves, but to children and extended families, too. In addition, the old fault grounds left the parties no alternative but to make their most intimate facts — which were often embarrassing or humiliating — matters of public knowledge.

2. No-fault grounds were necessary to protect the integrity of the legal system. To prove fault grounds, parties mutually desiring a divorce would perjure themselves. Sympathetic Judges found "cruelty" in thin air. Attorneys and clients arranged phony out-of-state residences to access more lenient laws. The system winked at lies and, consequently, shared in the deceit.

3. No-fault grounds bridged the gap between the law-as-written and the law-as-applied. The inability of the law to enforce the ancient fault ground goals had become obvious. Courts were granting no-fault divorces, but simply weren't saying so. The law was simply unable to force an unhappy spouse to continue on with a despised partner.

4. No-fault grounds more accurately reflected modern notions of marriage and divorce. Blameworthiness was regarded as less important and, also, more complex than the former belief that, in all instances, one party bore

all fault for the marital demise, the other none. This more modern belief accepted the notion that the state had little interest in unduly preserving as fiction marriages considered, by one or both spouses, irretrievably broken. No Fault Divorce and the Divorce Conundrum, 1991 B.Y.U. L. Rev. 79

For the foregoing reasons, among others, in 1969, California became the first jurisdiction in America (and the Western World) to adopt a modern, purely "no fault" divorce scheme, when it passed the Family Law Act of 1969. Since then, every State in the Union, save Arkansas, allows some type of "no fault" divorce. No good reason exists to accept Kevin's invitation to jettison the virtually unanimous wisdom of the day.

Third and finally, the Minnesota Court of Appeals dismissed the assumption implicit in Kevin's argument, namely, that Minnesota's statutes allow divorce too easily or, as he characterized, "on demand". Those statutes most definitely do not.

In Minnesota, all grounds for, and defenses to, a divorce action were abolished by statutory amendments in 1974 and 1978. M.S., § 518.06. The sole ground for dissolution of a marriage is an irretrievable breakdown of the marriage relationship. Id. The term "dissolution of marriage" means the same thing as "divorce". M.S., § 518.002.

If one party, as in this case, denies under oath or affirmation that the marriage is irretrievably broken, the Court must consider all relevant factors, including the circumstances giving rise to the action and the prospect of reconciliation, and shall make a finding whether the marriage

is, indeed, irretrievably broken. M.S., § 518.13, subd. 2. A finding of "irretrievable breakdown" is a determination that there is no reasonable prospect of reconciliation. *Id.* The finding must be supported by evidence that:

1. the parties have lived separate and apart for a period of not less than 180 days immediately preceding commencement of the proceeding; or

2. there is serious marital discord adversely affecting the attitude of one or both of the parties toward marriage. Id., emphasis supplied.

The above-described statutory scheme, by its own terms, refutes Kevin's claim that Minnesota's statutes permit cavalier dissolution or sanction "divorce on demand". The State District Court in this case heard ample evidence of "serious marital discord" and made appropriate findings.

III.

KEVIN'S RIGHT TO COUNSEL AND HEARING WAS HONORED

Kevin asserts that he was denied his 14th Amendment right to counsel and hearing. He was not. He had an attorney, but urged, then consented to, that attorney's discharge six weeks before trial. He was given over a month's notice of the trial date. He appeared at the time, date and place of trial, but of his own volition refused to participate. Kevin was not denied the right to counsel or hearing. He simply chose not to avail himself of those rights. He now asks this Court to spare him the consequences of his own free choices.

CONCLUSION

This case possesses none of the features which favor review by the United States Supreme Court. It involves no conflict between Courts of different States or federal Circuits. It involves no unsettled, unresolved issue.

Respondent respectfully prays that this Honorable Court deny the petition.

Respectfully submitted,

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